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No. 391

IN THE

Supreme Court of the United States

ROBERT BALLARD BAILEY,
Petitioner and Appellant Below,

v.

THE STATE OF WEST VIRGINIA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

W. HAYES PETTRY,
Attorney for and of Counsel with Petitioner.

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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IN THE

Supreme Court of the United States

ROBERT BALLARD BAILEY,
Petitioner and Appellant Below,

v.

THE STATE OF WEST VIRGINIA,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

To the Honorable, the Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert Ballard Bailey, respectfully represents and prays that a writ of certiorari issue to review the judgment of the Intermediate Court of Kanawha County, West Virginia, entered in the above cause on the 9th day of March, 1950, (R. 160), and also the final judgment order of the Circuit Court of Kanawha County, West Virginia, entered in the above cause on the 13th day of May, 1950, (R. 161). The Supreme Court of Appeals of West Virginia denied a writ of error and supersedeas in said cause four distinct and separate times: First denial (R. 1); second denial (R. 162); third denial (R. 164); fourth denial (R. 164); and on the fifth application on August 8th, 1950, the Supreme Court of Appeals of West Virginia held that the courts below were plainly right and the judgment of the said Supreme

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Court of Appeals of West Virginia became a final order. (R. 182). The Supreme Court of Appeals of West Virginia is the highest tribunal of the State of West Virginia.

I.

JURISDICTION

The jurisdiction of this Court is founded on Title 28, U. S. Code, Section 1257(3), and the Revised Rules of the Supreme Court of the United States. Rule 38 § 5(a).

II.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent parts of the Sixth and Fourteenth Amendments to the Constitution of the United States and the pertinent parts of Article 3, Sections 10 and 14 of the Constitution of West Virginia are printed in Appendix "A".

III.

STATEMENT OF THE CASE

(a) Statement of the Questions Involved

1. Whether the trial court erred in refusing to instruct the jury to find the defendant not guilty.

2. Whether the trial court erred in denying the motion of the petitioner to set aside the jury verdict.

3. Whether the trial court erred in refusing to sustain the motion of the defendant to strike out all the testimony of Joe Fazio, Frank Fazio and Mrs. Frank Fazio relating to the dying declaration of the decedent Rosina Fazio. (R. 100).

4. Whether the trial court erred in giving Instructions Nos. 1, 2, 3 and 4 as offered by the State.

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5. Whether the trial court erred in refusing to give Instructions Nos. 1, 2, 3, 4, 6, 9, 13, 14, 18, 19, 20, 23, 25, 26, 29 and 35 as offered by the defendant.

6. Whether the Supreme Court of Appeals of West Virginia erred in refusing to follow the principle of law as enunciated by this Court in the case of *Shephard* vs. *United States*, 290 U. S. 96, that the statement of a person who says: "I am not going to get well" and "I am going to die" is a statement of anticipation of death but does not imply that the declarant had abandoned all hope of recovery, and any statement made at that time relating to the cause and reason of declarant's condition is not admissible in evidence as a dying declaration.

7. Whether the Supreme Court of Appeals of West Virginia erred in refusing to follow the cases of *Carver* vs. *United States*, 160 U. S. 532, and *Mattox* vs. *United States*, 146 U. S. 140, wherein the court upheld the trial court in admitting the statement of Rosina Fazio in evidence as a dying declaration without the proper foundation being laid,—that Rosina Fazio's state of mind was consciousness of impending and certain death and despair of recovery.

8. Whether the Supreme Court of Appeals of West Virginia erred in refusing to grant a writ of error and supersedeas reversing the Circuit Court of Kanawha County, West Virginia, and the trial court.

9. Whether the Supreme Court of West Virginia erred in refusing to consider affidavits of Thelma Coleman and John Coleman as newly discovered evidence and grant a new trial to defendant.

(b) Statement of Proceedings

An indictment was returned by the Grand Jury for the State of West Virginia, January, 1950, Term of the Intermediate Court of Kanawha County, West Virginia,

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charging your petitioner with the murder of Rosina Fazio. A demurrer was interposed to the indictment and a motion was made to quash the indictment, which said motions were denied. The case proceeded to trial before the court and a jury and at the end of the evidence the defendant moved the court to instruct the jury to find him not guilty, which motion was denied by the court. At the end of the entire case the jury returned a verdict of guilty. A motion was made to set aside the verdict of the jury and to grant a new trial. This motion was denied, and the court sentenced your petitioner to death by electrocution at the Penitentiary at Moundsville, West Virginia, on the 16th day of June, 1950, upon the conviction of murder in the first degree without recommendation of mercy.

(c) Statement of the Case

Your petitioner on October 22, 1949 (R. 125) returned to Charleston, his home, about one o'clock from a hunting trip. He met some friends on returning; they bought some wine and drank it. This was about two-thirty P. M. that afternoon; then he went to a gas station on Central Avenue at about three-thirty that same afternoon. The police arrested three boys at the gas station who were with your petitioner. (R. 54). Petitioner escaped in his car before the police could arrest him, and the police pursued petitioner and chased the petitioner for several blocks and finally petitioner eluded the police and during the chase the police hit petitioner's automobile with three bullets in the rear of his car. (R. 56). This occurred that afternoon after three-thirty P. M. (R. 54). The three boys who were arrested by the police were booked at Police Headquarters about three-thirty-eight P. M. (R. 142). At about five-fifteen P. M., the same evening, (R. 103) the petitioner was seen by Mr. Warner, a former State Police, in Charleston. Warner saw no one in petitioner's car and he was driving at a

reasonably slow rate of speed. (R. 103). Petitioner had previously been convicted of three felonies and had served a sentence for each crime (R. 139). Under the West Virginia Habitual Criminal Act another felony committed by the petitioner would mean life imprisonment. Also the petitioner had been previously convicted of driving drunk and at the time he was convicted of driving drunk the law in effect then was that a second conviction was a felony. Petitioner did not return home until about eight-thirty P. M. that evening. (R. 129). About eleven o'clock A. M., the next morning petitioner went to a friend's home and stayed there at the friend's home Sunday night and on Monday he went to Florida, and while he was going to Florida he was unaware of the Mrs. Rosina Fazio incident. (R. 133).

Mrs. Rosina Fazio, of whose murder the petitioner was convicted, was found the night of October 22, 1949, at about eleven-thirty P. M. by Ruth Prenty on a street in the rear of Mrs. Fazio's place of business. (R. 49). Upon discovery of Mrs. Fazio, Mrs. Prenty sent for Mrs. Jeannie Shafer. Mr. Dominic Fazio, the husband of Rosina Fazio, was notified and came to the scene. (R. 50). Mrs. Fazio was taken in an ambulance to the hospital and her husband, Dominic Fazio, accompanied her to the hospital. At their arrival at the hospital Mr. Fazio, the husband of Rosina Fazio, took something resembling a pocketbook from Mrs. Fazio. (R. 90). At the hospital it was discovered that Mrs. Rosina Fazio had suffered an injury to her spine and possibly a broken neck which paralyzed her from the waist down. (R. 24-27). She remained in the hospital until her death Tuesday morning, October 25, 1949. (R. 85). The record discloses that the police were not called in until about nine o'clock Sunday morning, the day after Mrs. Fazio was found. (R. 80).

The Record discloses (R. 29) that about ten minutes after three o'clock P. M. Mrs. Rosina Fazio was at the home of Mrs. Joe Vettri, going to the store a few blocks away. The next time Mrs. Fazio was seen was by Ruby Evans on Bullitt Street (R. 31) in an automobile. Ruby Evans testified that she did not know the man with whom Rosina Fazio was riding, but at the trial (R. 31) she identified the man driving the car as the petitioner, and that it was three-thirty o'clock in the afternoon when she saw Mrs. Fazio. (R. 32). At that time the petitioner was being pursued by the police officers in another section of the city. (R. 56). The next place Mrs. Rosina Fazio was seen was (R. 35) about a five minute drive from where Mrs. Ruby Evans had seen her at three-thirty o'clock. She was seen by Thelma Coleman (R. 35) and Walter J. Mullins (R. 43) where they found her lying in a ditch. Mrs. Coleman saw a car going by and heard a woman scream. She went up the road and found Mrs. Fazio lying in the ditch. (R. 35). Walter J. Mullins saw a car which he identified as a black Dodge Sedan, 1946 Model, going up the road; (R. 43) saw the right door open and a woman's leg protrude from the car; the car went around a curve out of sight and when he reached the curve he saw Mrs. Fazio lying in the ditch. (R. 43). The time was fixed by Mullins (R. 43) as between three-thirty and four o'clock the same afternoon. This would seem to corroborate Mrs. Ruby Evans (R. 32) having seen Mrs. Fazio at three-thirty because it is about a five minute drive from where Mrs. Evans had seen Mrs. Fazio to the place where Mullins and Mrs. Coleman found her. Mullins (R. 45) identified the driver of the car which came back to where Mrs. Fazio was lying in the ditch, and Mullins and the driver of the car, whom Mullins identified as Bailey, put Mrs. Fazio in the car. NOTE: Mrs. Coleman who was present when Mrs. Fazio was found and placed in the car says that she had no idea who the man was that came in the automobile,

but in her affidavit (R. 178) she says that she told the Prosecuting Attorney that she did not know the man who picked Mrs. Fazio up, and the affidavit further states that the man who picked Mrs. Fazio up was not Robert Ballard Bailey. Also the affidavit of John Coleman, husband of Thelma Coleman, (R. 179) who came in a taxi to the scene asserts that it was a green car and the man driving the car was not Robert Ballard Bailey, (R. 180) and that before the trial he had told the police officers who showed him a picture of Robert Ballard Bailey that it was not the picture of the man who was driving the car in which Mrs. Fazio was sitting at the time he came to the place where Mrs. Fazio was found. It is interesting that Mrs. Coleman was not called upon to identify Bailey in the court room, and also that her husband was not called by the State as a witness. Also it is an oddity that Mullins when he helped place Mrs. Fazio (R. 45) in the car did not inquire of the driver of the car what had happened to cause Mrs. Fazio to come out of said car and fall into the ditch, and why Mr. Mullins would put Mrs. Fazio into the same car from which she had fallen. The State is void of any evidence as to Mrs. Fazio's whereabouts from three-thirty or four o'clock P. M. until eleven-thirty P. M. when she was found, although the petitioner was seen by Mr. Warner about five-fifteen o'clock that same evening and Mr. Warner saw no one in his car. (R. 103).

The only evidence as to the purported statements of Mrs. Rosina Fazio which were used by the State as a dying declaration was the testimony of Joe Fazio, (R. 79) and Frank Fazio (R. 97), sons of Mrs. Rosina Fazio, and Mrs. Frank Fazio, (R. 99) a daughter-in-law of Mrs. Rosina Fazio, although two doctors had seen her and several nurses had attended her. The purported dying declaration was made on Sunday, October 23, 1949. Mrs. Fazio died October 25, 1949, two days later. Joe Fazio

testified (R. 78) that he went to the hospital on Sunday morning between six and seven o'clock; that he saw his mother on that occasion and talked to his mother concerning her injuries and her life expectancy and that she told him that she couldn't move her lower limbs (R. 78-79) and that her bones had been broken and that Bob had broken all her bones and that she was going to die, (R. 79) and at the same time Mrs. Fazio told Joe that she hadn't had anything to eat for two days; (R. 79) that she said Bob, the Glass Cutter had caused her injuries. About nine o'clock A. M. he went to the police station and a negative of Robert Ballard Bailey was supplied and a picture was developed and Joe Fazio took the picture to the hospital (R. 80) and showed it to Mrs. Rosina Fazio and told her he was going to show her a picture of Robert Ballard Bailey and wanted her to answer if it was his picture and she said, "Yes, it was him." (R. 81) and at the same time she said she was going to die and that Robert Bailey had robbed her.

Frank Fazio, another son, testified (R. 97) that his mother told him that "Bob, the Glass Cutter", had caused her injuries; that she couldn't feel anything; "all my bones are broken; I am going to die."

Mrs. Frank Fazio testified (R. 99) that on Sunday, October 23rd, 1949, she was present with her husband, Frank Fazio, and that Mrs. Rosina Fazio said she was going to die; "He killed me, he broke all my bones and I know I will die."

Dr. H. M. Hills, Jr., Mrs. Fazio's doctor, testified (R. 27) that he saw Mrs. Fazio at the hospital about midnight or early Sunday morning; that on Sunday, October 23rd, he saw Mrs. Fazio in the forenoon and the afternoon and that she was mentally alert after she had recovered from shock. (R. 28). Dr. Hills' evidence does not disclose that he informed Mrs. Fazio of any impend-

ing and certain death. Also the record is silent as to whether any qualified person had informed Mrs. Fazio that she was going to die or that her death was immediate or certain.

IV.

REASONS FOR ALLOWANCE OF WRIT

1. This Court should take jurisdiction of this case for the reason that the Supreme Court of Appeals of West Virginia did consider and dispose of the federal question by their final order. (R. 183).

In the cases of *Radio Station W. O. W.* v. *Johnson*, 326 U. S. 120; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *Helvering* v. *Wiese*, 292 U. S. 614; *United States* v. *Rabinowitz*, 339 U. S. 56; *Ickes* v. *Virginia Colorado Dev. Corp.*, 295 U. S. 639, 640-646; *Six Companies* v. *Highway District*, 311 U. S. 180; *West* v. *American T. & T. Co.*, 311 U. S. 223; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, this Court held in effect that when the highest State Court uses language indicating that the Federal question was considered and disposed of by the court, then this Court may assert its jurisdiction in the same manner had the question been raised prior to the original disposition.

In the case of *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 267-8, and *Edwards* v. *Elliott*, 21 Wall 532, 549-51, this Court held in effect that any deficiency in the petition in which a Federal issue is framed is cured after the highest State Court assumes that a specified Federal issue is properly before it and then expressly considers and determines that issue. In that event, the Supreme Court of the United States does not inquire into the framing of the issues between the litigants in the first instance.

In the case of *Louisville & Nashville R. R. Co.* v. *Higdon*, 234 U. S. 592, this Court held in effect, but when-

ever the highest State Court does consider and decide the Federal question, despite any tardiness in their assertion, the Supreme Court will not go behind the action of the Court in that respect, and this Court may take the question on the assumption that the Federal issues were properly raised.

In the case of *First National Bank* v. *Hartford*, 273 U. S. 548, this Court held that the finding of the State Court that an asserted Federal question was without basis in fact was not binding on the Supreme Court.

2. That the Supreme Court of Appeals of West Virginia by refusing to review and affirming the trial court has in effect decided the words "I am not going to get well" and "I am going to die" implies that declarant has abandoned all hope of recovery and any statement made at the same time relating to the cause and reason for the declarant's condition is admissible in evidence as a dying declaration.

The refusal of the Supreme Court of Appeals of West Virginia to review this case and assertion that the trial court was plainly right is in direct conflict with the decision of *Shephard* v. *United States*, 290 U. S. 96 wherein this Court held that the words "I am not going to get well" and "I am going to die", as used by the declarant, were statements of anticipation of death but do not imply that the declarant has abandoned all hope of recovery and any statement made at the same time relating to the cause and reason for the declarant's condition is not admissible in evidence as a dying declaration. *Shephard* v. *United States*, *Supra*, was cited to the Supreme Court of Appeals and the Court was asked to follow it. (R. 165).

3. The Supreme Court of Appeals of West Virginia has never decided the proposition where a statement made by a declarant who said "I am not going to get well" and "I am going to die" are words sufficient to lay

the foundation that declarant's state of mind was consciousness of impending and certain death and despair of recovery in order that a statement made at the same time was admissible in evidence as a dying declaration.

The Supreme Court of Appeals of West Virginia, in refusing to follow the *Shephard* v. *United States, Supra,* case was in conflict with the decision of this Court and the Courts of other jurisdictions in cases which involve a question of extreme gravity and general importance, and a writ of certiorari should be granted, *Fields* v. *United States,* 205 U. S. 292; *People of the State of Illinois, Ex Rel Gordon, Director of Labor* v. *United States,* 328 U. S. 8.

4. The Supreme Court of Appeals of West Virginia is not in accord with the decisions of this Court and is in direct conflict with the decisions of this Court in the cases of *Carver* v. *United States,* 160 U. S. 532, and *Mattox* v. *United States,* 146 U. S. 140, wherein the Supreme Court of Appeals of West Virginia upheld the trial court in admitting the statement of Rosina Fazio in evidence as a dying declaration without the proper foundation being laid, — that Rosina Fazio's state of mind was consciousness of impending and certain death and despair of recovery.

5. The Supreme Court of Appeals of West Virginia has decided a federal question in such a way which is not in accord with the applicable decisions of this Court. Revised Rules of the Supreme Court of the United States, Rule 38 § 5(a).

6. The action of the Supreme Court of Appeals of West Virginia by refusing to review this case affects the scope of prior rulings of this Court wherein it was presented to the Supreme Court of Appeals of West Virginia by the cases of this Court cited to them in petitioner's brief as to dying declarations. The refusal of the

Supreme Court of Appeals of West Virginia to follow this Court is in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States in that the accused shall be confronted with the witnesses against him, (the exceptions being dying declarations).

7. The Supreme Court of the United States should take jurisdiction of this case because of the gravity of the death penalty imposed on Robert Ballard Bailey without due process of law, wherein the Supreme Court of Appeals of West Virginia refused to review this case and grant the petitioner a new trial upon presentation of newly discovered evidence; therefore, in violation of the Fourteenth Amendment of the Constitution of the United States.

8. The decisions of the Supreme Court of Appeals of West Virginia should be in uniformity with this Court and the various other State Courts and also should be uniform and in conformity with its own decisions, and this Court should grant the writ of certiorari as prayed and correct the action of the Supreme Court of Appeals of West Virginia heretofore taken herein.

PRAYER

WHEREFORE, petitioner prays that this petition be granted and for such other and further relief in the premises that may be proper and just.

This the 24th day of October, 1950.

ROBERT BALLARD BAILEY,

By W. HAYES PETTRY,
Attorney for and of
Counsel with Petitioner.

IN THE

Supreme Court of the United States

ROBERT BALLARD BAILEY,
Petitioner and Appellant Below,

v.

THE STATE OF WEST VIRGINIA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

OPINION OF THE COURT BELOW

The Supreme Court of Appeals of West Virginia held that the courts below were plainly right and there was no written opinion by any court.

II.

JURISDICTION

1. The jurisdiction of this Court is founded on Title U. S. C. Section 1257 (3) and Revised Rules of the Supreme Court of the United States, Rule 38 § 5(a).

2. The judgment of the Supreme Court of Appeals of West Virginia holding that the courts below were plainly right was entered August 8, 1950.

III.

STATEMENT OF THE CASE

1. The facts of the case have already been related in the preceding petition under Title III (c).

2. The Assignment of Errors have already been related in the preceding petition under Title III (a).

IV.

GROUNDS FOR JURISDICTION

The grounds on which jurisdiction of this Court is invoked have already been related in the preceding petition under Title IV—Reasons for Allowance of Writ.

V.

ARGUMENT

(a) The trial court admitted the statement of Rosina Fazio in evidence as a dying declaration without the proper foundation being laid that Rosina Fazio's state of mind was consciousness of impending and certain death and despair of recovery and was violative of petitioner's rights under the Sixth and Fourteenth Amendments of the Constitution of the United States and of Sections 10 and 14 of Article 3 of the Constitution of West Virginia.

The State failed as a preliminary fact to lay the foundation that Rosina Fazio's state of mind was consciousness of certain and immediate death and despair of recovery. The Circuit Court of Kanawha County and the Supreme Court of Appeals of West Virginia, in effect, held that there was no error in the trial court's refusal to grant the motion of petitioner to exclude the purported dying declaration of Rosina Fazio.

Evidence as to the life expectancy of Mrs. Rosina Fazio was that of her two sons and daughter-in-law, and her statement was in effect, — I am not going to get well,

and I am going to die, — and that Robert Bailey had robbed her, and at the same time Mrs. Fazio said that she had had nothing to eat for two days. This statement was made two days prior to her death. (R. 79). It is to be noted that no other persons heard these remarks by Mrs. Fazio other than her two sons and her daughter-in-law, although Dr. Hills was there that day and saw Mrs. Fazio, the nurses who attended her were there, and the police who were not admitted were at the door of Mrs. Fazio's room at the hospital. No competent authority at that time, according to the record, had advised Mrs. Fazio of immediate and certain death, and the record is silent as to the opinion of the doctors and nurses in regard to Mrs. Fazio's life expectancy, and it is strange that Mrs. Fazio would be concerned about not having had anything to eat for two days if she thought that her death was immediate and certain.

In reaching its conclusion the learned court failed to follow the decisions of this Court in the cases of *Carver* v. *United States*, 160 U. S. 532, *Mattox* v. *United States*, 146 U. S. 140, and *Shephard* v. *United States*, 290 U. S. 96, and other authorities and representative decisions.

By the weight of authority it is held that the preliminary matters necessary to the admission in evidence of a dying declaration must be proved beyond a reasonable doubt. The courts require that same degree of proof of these facts as required with respect to proof of the elements of the crime itself.

In the case of *Carver* v. *United States, Supra*, this Court held:

> "While in the admission of the declarations of the victim as to the facts of a homicide the utmost caution must be exercised to the end that it be satisfactorily established that they were made under the impression of almost immediate dissolution."

Both the Constitution of the United States and of the State of West Virginia, see Appendix "A", require that the accused shall be confronted with the witnesses against him. The only exception is a dying declaration in the trial of homicide and that is upon the theory that the sense of impending death and without any expectancy or hope of recovery will supplant the solemnity of an oath. We submit there is no evidence in this case that Mrs. Rosina Fazio was conscious of impending and certain death and despair of recovery.

The Supreme Court of West Virginia has never decided the proposition whether a statement made by a declarant who said: "I am not going to get well" and "I am going to die" is sufficient to lay the foundation that the declarant's state of mind was consciousness of impending and certain death and despair of recovery.

The Supreme Court of Appeals of West Virginia in reaching its conclusion failed to follow the decision of this Court in the case of *Shephard* v. *United States*, 290 U. S. 96 and other representative decisions.

The statement of Mrs. Rosina Fazio that "he robbed me" meaning Robert Ballard Bailey, is her opinion and the admission of her statement is in direct conflict with the case of *Shephard* v. *United States, Supra,* and also is in direct conflict with the West Virginia case of *State* v. *Graham*, 117 S. E. 699; 94 W. Va. 67. The decision in the *Graham* case will be found (R. 171-2), together with an article by Thomas P. Hardman, Dean of the College of Law, University of West Virginia, on this subject. It has been held by authorities that dying declarations must relate to facts and not to mere expressions or belief. Where a person dying from a gunshot declares "A shot me" "A killed me" "A is my murderer" is not admissible as a dying declaration, *State* v. *Baldwin*, 45 N. W. 297, and also the statement made by Mrs. Shephard, — "I am

not going to get well" and "I am going to die" and that "Dr. Shephard poisoned me" were not admissible as a dying declaration. *Shephard* v. *United States, Supra.*

It is interesting that the only evidence in this case as to robbery was by the witness Joe Fazio, when the question was propounded to him: "Did she say anything about her purse?" Answer, — "She said she was robbed." She made this statement only in Italian. We contend that Mrs. Fazio's assertion that she had been robbed was a mere opinion and conclusion and not a statement of fact.

The driver of the ambulance testified that Dominic Fazio, husband of Rosina Fazio, took something resembling a pocketbook from the person of Rosina Fazio (R. 90). Dominic Fazio was not present at the trial; the information that "He is sick in bed" was given by Joe Fazio (R. 77), the same witness upon whom the State relied for the interpretation of the statement of Rosina Fazio which was admitted in evidence as a dying declaration and had been made to him by Mrs. Fazio in the Italian language.

The Supreme Court of Appeals of West Virginia and the courts below have reached erroneous conclusions in this respect and are in direct conflict with this Court and other jurisdictions wherein we have searched.

(b) Whether the trial court erred in giving Instructions Nos. 1, 2, 3, and 4, as offered by the State.

Instruction No. 1 offered by the State in effect told the jury they could return only one of two verdicts: Murder in the first degree or not guilty. The court was in error for two reasons: First, there is no evidence in this record to justify an instruction on the theory of robbery. There is no evidence upon which the jury might base its finding that the defendant killed the deceased while in the at-

tempt of robbery. Second, the court was in error to limit the finding of the jury to murder in the first degree or not guilty, because it destroyed the rule of law relative to the other possible verdicts that may be found under an indictment in West Virginia.

It was error for the court to give Instructions Nos. 2 and 3, because there was no evidence to justify the giving of these instructions.

The court was in error in giving State's Instruction No. 4, when the court stated that one charged with a crime may be convicted by the jury upon circumstantial evidence alone. We do not believe this to be the law and the instruction was confusing to the jury and the instruction did not properly advise the jury of the law.

(c) Whether the trial court erred in refusing to give Defendant's Instructions Nos. 1, 2, 3, 4, 6, 9, 13, 14, 18, 19, 20, 23, 25, 26, 29, and 35.

Defendant's Instructions Nos. 2, 3, and 4 should have been given, because those instructions in effect told the jury of the different degrees in which they could find the defendant guilty. In view of the evidence in this case, the defendant should not have been guilty of anything more than involuntary manslaughter.

Instructions Nos. 9, 10, 11, 12, and 13 should have been given, and the failure of the court to give these instructions was prejudicial to the defendant, especially when his life was involved.

Defendant's Instructions Nos. 6, 9, 10, 14, 19, 20, 23, 25, 26, and 29 were refused—some of them not being applicable according to the construction of the evidence by the court—and some being covered by other instructions. These instructions should have been given.

Defendant's Instruction No. 35, which was refused by the court, was an instruction as to the various degrees of

murder in West Virginia and punishment therefor. The Court's refusal to give these instructions is in direct conflict with its own decision in the case of *State* v. *Allen*, 49 S. E. (2d) 847, and also other authorities.

(d) Whether the court erred in refusing to direct the jury to find the defendant not guilty, and also whether the court erred in refusing to set aside the verdict of the jury.

We submit that the evidence in this case is not sufficient to sustain the verdict of death of Robert Ballard Bailey. First, the State's proof was by the witness Ruby Evans who saw Mrs. Fazio at 3:30 o'clock in a car with a man whom she identified as Bailey. Walter J. Mullins saw Mrs. Fazio lying in a ditch between three and four o'clock. (Note, it is not a five minute drive from where Mrs. Evans saw Mrs. Fazio to the place where Mr. Mullins found her lying in the ditch.) The witness Mullins identified the driver of the car as Bailey. He also said that the car that picked up Mrs. Fazio was the same car that was driving ahead of him and from which he saw a woman's leg protrude before he reached the curve where he found Mrs. Fazio lying in the ditch. It is interesting that on return of the car he did not ask the driver of that car what had happened to Mrs. Fazio, or why he would ask the driver of that car, after he had seen Mrs. Fazio come out of said car, to take her to a hospital or to her home. This evidence is in direct conflict with other evidence of the State in respect to Robert Ballard Bailey's whereabouts. The police saw Bailey and arrested three boys who were with him in another section of the city at 3:30 o'clock—at the same time Mrs. Evans saw him with Mrs. Fazio in his car. The police pursued Bailey for some distance and were still pursuing Bailey at the same time that Mullins was at the scene where Mrs. Fazio came out of the car. Bailey could not have been in two different places at the same time. This evidence is irreconcilable. The record clearly shows that Bailey denied

any knowledge of the incident involving Mrs. Fazio. At the time the witness Mullins found Mrs. Fazio, the witness Coleman was also at the scene of the incident, and Mrs. Coleman's husband, John Coleman, came in a cab later. The two affidavits, presented to the Supreme Court of Appeals of West Virginia as newly discovered evidence, of Mrs. Coleman and her husband, John Coleman, was that the man who was driving the car in which Mrs. Fazio was placed was not Robert Ballard Bailey. Mrs. Coleman's affidavit which was filed with the Supreme Court of Appeals of West Virginia, together with her husband's affidavit, (R. 177-180) is proof that both Mrs. Evans and Mr. Mullins were mistaken in their identification of Bailey, and that the evidence of the police offered by the State was accurate. It is interesting to note in the affidavit of Mrs. Coleman that the man in whose car Mrs. Fazio was placed was not Robert Ballard Bailey, and also her husband told the police, according to his affidavit, that it was a green car and that the man who was driving the car in which Mrs. Fazio was placed was not Robert Ballard Bailey. We do not know the reason for suppressing the evidence of these two witnesses. Also the affidavits of Goldie Moore, George A. Rowlands and Carlin Smith which evidence was discovered since the determination by the Supreme Court of Appeals of West Virginia. (Appendix "B", "C" and "D"). The entire evidence joined together shows beyond a reasonable doubt that it was impossible for Robert Ballard Bailey to have committed the crime as charged in the indictment.

We submit that the statement of Rosina Fazio was not admissible in evidence as a dying declaration. We contend and urge that the trial court erred in refusing to direct the jury to find the defendant not guilty and/or to set aside the jury verdict of guilty without recom-

mendation and imposing the death penalty upon Robert Ballard Bailey.

We contend that the petitioner's case should be reopened and a new trial granted to him because of the newly discovered evidence, the affidavits of Mr. and Mrs. Coleman (R. 177-180) which were considered by the Supreme Court of Appeals of West Virginia, and the affidavits of Goldie Moore, George A. Rowlands and Carlin Smith, evidence discovered after consideration by the Supreme Court of Appeals of West Virginia (Appendix "B", "C" and "D"); otherwise Robert Ballard Bailey's life will be taken without due process of law, in violation of the Constitution of the United States.

CONCLUSION

Your petitioner respectfully submits that the questions presented by the foregoing petition shows that the highest tribunal of the State of West Virginia considered a federal question and further that the foregoing petition shows a well defined conflict exists between the decisions of the Supreme Court of Appeals of West Virginia, and further that the decisions of the Supreme Court of Appeals of West Virginia is in conflict with its own prior decisions and the decisions of courts of other jurisdictions, and that there is involved important questions of Constitutional and Federal law in this case, and this case is one calling for the exercise by this Court of its supervisory powers in order that the rights under the Constitution of the United States and the Constitution of the State of West Virginia be preserved, and a writ of certiorari should be granted and the questions herein should be reviewed by this Court.

Respectfully submitted,

W. Hayes Pettry,

Attorney for and of

Counsel with Petitioner.

APPENDIX "A"

CONSTITUTION OF THE UNITED STATES

The pertinent part of the Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * to be confronted with the witnesses against him * * *."

The pertinent part of the Fourteenth Amendment provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CONSTITUTION OF WEST VIRGINIA

The pertinent parts of Sections 10 and 14 of Article 3 of the Constitution of West Virginia.

The pertinent part of Section 10, Article 3, provides:

> "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

The pertinent part of Section 14, Article 3, provides:

> "In all such trials, the accused shall be * * *, and be confronted with the witnesses against him * * *."

APPENDIX "B"

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

This day personally appeared Goldie Moore before the undersigned authority, who after being duly qualified according to law deposes and says that she is twenty-eight years old; that she lives at Elk Two Mile, Route 6, Box 577A, Charleston, Kanawha County, West Virginia; that she knows Dominic Fazio and also knows his son Joe Fazio and also that she knew Mrs. Rosina Fazio in her lifetime, and that she also knows Robert Ballard Bailey.

Deponent further avers and says that on October 22, 1949, on Saturday afternoon, about between the hours of Five o'clock and five-thirty o'clock, P. M., that she had left her home in a car with George Rowlands, going to the A. & P. Super Market in Charleston when she reached the rock quarry, close to the Incinerator on Elk Two Mile Road, she saw a black Dodge Sedan sitting there and Mrs. Rosina Fazio was sitting in the said car and a man was sitting in the car with a striped cap, resembling a railroad cap, and the affiant definitely says that the man sitting in the car with Mrs. Rosina Fazio was not Robert Ballard Bailey.

Deponent further avers and says that she came to the A. & P. Super Market in Charleston, West Virginia, and returning to her home at the Rock Quarry where she had seen Mrs. Fazio and some man there was a green car and affiant says that she saw Joe Fazio, a son of Mrs. Rosina Fazio, sitting in the green car and that it was about six o'clock when she saw Joe Fazio sitting at the Rock Quarry in the green car, that being about the same place where Mrs. Rosina Fazio had been sitting with some man in a black Dodge Sedan, and that the black Dodge Sedan had left.

Deponent further says that she definitely knows that the man sitting in the black Dodge Sedan at the Rock

Quarry was not Robert Ballard Bailey; that his face was full and he seemed to be a fat man.,

Deponent further says that about two or three weeks ago she was at Fazio's Beer Garden or Genoa's Tavern and she was talking about the death of Mrs. Rosina Fazio with some other people and that the affiant stated to those people that Robert Ballard Bailey wasn't the man in the black car with Mrs. Fazio, but she knew that the man in the green car was Joe Fazio and at that time Dominic Fazio, the father of Joe Fazio, took from behind the counter a sickle and the said Dominic Fazio said to the affiant that she talked too much and that the case was closed, and then sometime after, that same evening when this discussion was had at the Fazio Beer place, Dominic Fazio asked the affiant to come back the next morning at ten o'clock by herself, but affiant says she did not go.

Deponent further says that about two weeks ago she was at the Fazio Beer place, together with Carlin Smith, and was discussing the case of Robert Ballard Bailey and the murder of Mrs. Rosina Fazio with Mr. Smith, and that Mr. Dominic Fazio said that he had been over on the Boulevard to buy something and that they wanted $25.00 for it, and affiant says she asked Mr. Fazio what it was and his daughter Stella Fazio walked over behind the counter and picked up a revolver or pistol and said this is what he bought. She had the gun pointed toward affiant and Mr. Smith said "Keep that thing out of my face" and she replied that it wouldn't hurt him that it was a toy. Affiant further says that she believes it was a real revolver. And affiant further says that she has not been back there since for the reason that she is afraid of bodily harm.

Deponent further says that she has known Robert Ballard Bailey for two or three years.

S/ GOLDIE MOORE.

Taken, subscribed and sworn to before me this the 22nd day of August, 1950.

My commission expires the 18th day of March, 1956.

S/ DEWEY B. JONES,
Notary Public.

APPENDIX "C"

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

This day personally appeared George A. Rowlands, who after being duly qualified according to law deposes and says that he is fifty-four years old and that he lives on Elk Two Mile Route 6, Box 257, Charleston, Kanawha County, West Virginia, and that he has worked at Libbey-Owens-Ford Sheet Glass Company for eighteen years.

Affiant further says that he has known Dominic Fazio for approximately twenty years; also knows his son Joe Fazio when he sees him, and also that he has known Mrs. Rosina Fazio in her lifetime for approximately twenty years and he also knows Robert Ballard Bailey when he sees him.

Affiant further avers and says that on October 22, 1949, on Saturday afternoon, a short time before five o'clock P. M. on that date, that being the date that affiant read in the newspapers the week following on which Mrs. Rosina Fazio was injured on Elk Two Mile Road and being injured she died, and that Robert Ballard Bailey was accused of her murder, that Goldie Moore was in his car and they were going to the A. & P. Grocery Store in Charleston, and when they reached the Rock Quarry on the Elk River Two Mile Road, close to the incinerator on said road that they saw a black Dodge Sedan automobile parked on the right hand side of the road going up Elk River Two Mile Road and the said car was headed up Elk Two Mile Road, and sitting in the front seat of that parked black Dodge Sedan automobile was a woman and a man. The woman who was in the car was Mrs. Rosina Fazio sitting in the front seat with her head resting on her right shoulder, and affiant said to Goldie Moore he wondered what Mrs. Fazio was doing up Elk Two Mile and if there was anything wrong with her and also remarked

to Goldie Moore "Let's stop and see what is wrong with Mrs. Fazio" and Goldie Moore said no, there is a man with her and if there is anything wrong with her he will take care of her. The man in the car was unknown to affiant but, however, the man sitting in the front seat with Mrs. Fazio was fleshy with a large round fleshy face and wearing a railroad engineer's cap, and affiant definitely says that the man sitting in the car with Mrs. Fazio was not Robert Ballard Bailey.

Affiant further says that he has known Robert Ballard Bailey by sight for about four or five years, and affiant further says that after this incident and during the murder trial of Robert Ballard Bailey he saw Robert Ballard Bailey's picture in the paper and that the man he saw sitting in the car with Mrs. Fazio was not the same as the picture in the paper which said it was Robert Ballard Bailey.

Affiant further avers and says that when he and Goldie Moore after being at the A. & P. Store were returning to his home at the Rock Quarry where he had seen Mrs. Fazio and some man as they went down the road, that the black Dodge Car had left, but there was a green car parked on the right hand side of the road coming down, headed in the direction of Charleston, directly and opposite and across the road from where the black Dodge Sedan Automobile was parked when the affiant and Goldie Moore came to the A. & P. Store, as aforesaid. Affiant did not observe who was in the green car.

Affiant further avers and says that the first time he ever told this story was to John Bailes on August 22, 1950, excepting that a day or two after Mrs. Fazio died that he and Goldie Moore discussed it with Goldie Moore's aunt, and affiant further says that he would have related what he knew about this case as stated in this affidavit before but he was not aware it had any bearing

on the case and for this reason he had not informed any of the Bailey family.

S/ GEORGE A. ROWLANDS.

Taken, subscribed and sworn to before me this 23rd day of August, 1950.

My commission expires the 11th day of October, 1950.

S/ MALCOLM ORTH,
Notary Public.

APPENDIX "D"

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

This day personally appeared Carlin Smith before the undersigned authority, who after being duly qualified according to law deposes and says that he lives at Elk Two Mile, Route 6, Charleston, Kanawha County, West Virginia.

Deponent further says that about two weeks ago he was at the Fazio Beer place, together with Goldie Moore and was discussing the case of Robert Ballard Bailey and the murder of Mrs. Rosina Fazio with Goldie Moore, and that Mr. Dominic Fazio said that he had been over on the Boulevard to buy something and that they wanted $25.00 for it, and Goldie Moore asked Mr. Fazio what it was and his daughter Stella Fazio walked over behind the counter and picked up a revolver or pistol and said this is what he bought. She had the gun pointed toward Goldie Moore and affiant said "Keep that thing out of my face" and she replied that it wouldn't hurt him it was a toy. Affiant further says that he believes it was a real revolver.

his
S/ CARLIN X SMITH.
mark

Witness to mark, D. Boone Dawson.

Taken, subscribed and sworn to before me this 22nd day of August, 1955.

My commission expires the 18th day of March, 1956.

S/ DEWEY B. JONES,
Notary Public.

Office-Supreme Court, U. S.
FILED
NOV 29 1950
CHARLES ELMORE CROPLEY
CLERK

NO. 391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

ROBERT BALLARD BAILEY, *Petitioner*

v.

THE STATE OF WEST VIRGINIA, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

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Of Counsel:
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JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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NO. 391

IN THE

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OCTOBER TERM, 1950

ROBERT BALLARD BAILEY, *Petitioner*

v.

THE STATE OF WEST VIRGINIA, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO ALLOWANCE OF WRIT OF CERTIORARI

JURISDICTION

According to the statement in the petition for a writ of certiorari, the jurisdiction of this Court is invoked under the provisions of Section 1257(3), United States Code, and Section 5(a) of Rule 38 of the Revised Rules of this Court. (Petition, page 2.)

From the petition, we infer that petitioner would have this Court grant a writ of certiorari in this case on one or both of the following contentions, namely:

> (1) The refusal of the Supreme Court of Appeals of West Virginia to follow *Shepard* v. *United States,* 290 U. S. 96, 78 L. Ed. 196; *Carver* v. *United States,* 160 U. S. 553, 40 L. Ed. 532; and *Mattox* v.

United States, 146 U. S. 140, 36 L. Ed. 917 (Petition, pages 10, 11); and

(2) The Supreme Court of Appeals of West Virginia has violated the Sixth and Fourteenth Amendments of the Constitution ot the United States by refusing to follow the above cases, and refusing to hold that the dying declarations of Rosina Fazio, the victim, were inadmissible on the trial of petitioner. (Petition, pages 11, 12).

We do not believe that any vestige of a federal question can be gleaned from either the petition or the brief in support thereof filed by petitioner other than these two.

In answer to the contentions of petitioner, the State of West Virginia contends:

(1) There was no question raised in any court below that the petitioner had been deprived of any right under the Constitution of the United States, and therefore any such right involved herein has been waived; and

(2) There is no substance to the claim of petitioner that he has been deprived of a right granted or preserved to him by the Constitution of the United States under either the Sixth or Fourteenth Amendments.

STATEMENT OF CASE

Robert Ballard Bailey was convicted in the Intermediate Court of Kanawha County, West Virginia, for the murder of Rosina Fazio, who died on the 24th day of October, 1949, and was sentenced to be electrocuted. (R. 13). On the 13th day of May, 1950, the Circuit Court of Kanawha County, an intermediate appellate court, refused Bailey a writ of error and supersedeas to the judgment of the Intermediate Court (R. 161), and on the 7th day of June, the 13th day of June, the 3rd day of July, the 7th day of August, and the 8th day of August,

all in the year 1950 (R. 162, 164, 182), the Supreme Court of Appeals of West Virginia, the highest court in the State of West Virginia, denied a writ of error and supersedeas to the judgment of the Circuit Court.

On the trial of petitioner, certain dying declarations of Rosina Fazio were admitted in evidence over the objection of petitioner.

The first witness to testify about such dying declarations was Joe Fazio, age twenty-seven, son of Rosina Fazio, who testified that he first visited his mother in the St. Francis Hospital, in the City of Charleston, West Virginia, where she lay on her death bed, between the hours of six and seven o'clock on Sunday morning, the 23rd day of October, 1949. (R. 78). Mrs. Fazio was hospitalized for pain in the neck and back following an injury that paralyzed all the local extremities and a partial paralysis of the arm, a loss of all sensation from the upper part of the chest down and a total lack of sensation with a complete paralysis of the lower extremities of the chest wall muscles, all caused by a spinal cord injury. (R. 27). But Mrs. Fazio was mentally alert on Sunday, October 23, when she made these dying declarations. (R. 28). Mrs. Fazio had been found on a vacant lot in the City of Charleston, at twenty-five minutes after eleven o'clock on October 22, suffering from the injuries which caused her death. (R. 49). Joe talked to his mother concerning her injuries and with reference to her expectancy of life. She told Joe that she was going to die (R. 79), and in the same conversation complained of "this thing" (a halter on her neck with attached weights), (R. 27), said she had been suffering a whole lot, and wanted all the kids to be there, that she was going to die. (R. 79). After this conversation, Joe, with his brother, Jim Fazio, went to police headquarters and developed a picture of the defendant, Robert Ballard Bailey. (R. 80). This action was taken because Rosina Fazio had told Joe, in her conversation

during which she said she was going to die, that Bob, the glass cutter had given her a lift (R. 80), that Bob had broken all her bones (R. 79), and had robbed her. (R. 81). After this picture was developed Joe took the print back to his mother in the hospital, and she there identified the picture as being the picture of Robert Bailey, whom she at that time said had robbed her. (R. 81). On cross-examination, Joe said that his mother told him it was "Bob, the glass cutter," that she didn't know his name, and when he mentioned the word Bailey she remembered it. (R. 84).

Frank Fazio, another son of Rosina Fazio, saw his mother between two and four o'clock on Sunday afternoon, October 23, and talked to her concerning her physical condition and her expectancy of life. She told Frank that she was not going to live, that all her bones were broken and she couldn't feel anything, and she was not going to live long. (R. 97). At that time she was in distress and hurting. After she had made these statements, she told Frank, in reply to his answer as to who had done it, "Frank, you know; Bob, the glass cutter." (R. 97). Mrs. Frank Fazio, daughter-in-law of Rosina Fazio who was present at the time of the conversation between Frank and his mother, said that Rosina Fazio had said she was going to die, "He killed me, he broke all my bones and I know I will die." (R. 99). The person designated by Rosina Fazio as having committed this crime was "Bob, the glass cutter." She further testified that Rosina Fazio said, "He dragged her by the hair and put her back in the car once." (R. 99). Rosina Fazio died at six o'clock on the morning of October 25. (R. 28, 29.)

ARGUMENT SUMMARY

I

A writ of certiorari should not be granted by this Court to a judgment of a State Court when no substantial federal question is involved.

Yakus v. *United States,* 321 U. S. 414, 88 L. Ed. 834;

Whitney v. *California,* 274 U. S. 357, 71 L. Ed. 1095.

II

The Sixth Amendment of the Constitution of the United States does not govern procedure in the trial of criminal cases in State Courts.

Wolf v. *Colorado,* 338 U. S. 25, 93 L. Ed. 1782;

Adamson v. *California,* 332 U. S. 46, 91 L. Ed. 1903;

Betts v. *Brady,* 316 U. S. 455, 86 L. Ed. 1595;

West v. *Louisiana,* 194 U. S. 258, 48 L. Ed. 965.

III

The Fourteenth Amendment to the Constitution of the United States does not guarantee a trial of State crimes in State Courts free from error, and does not require a State to conform to federal procedure and federal rules of evidence.

Bute v. *Illinois,* 333 U. S. 640, 92 L. Ed. 986;

Buchalter v. *New York,* 319 U. S. 427, 87 L. Ed. 1492;

Lisenba v. *California,* 314 U. S. 219, 86 L. Ed. 166;

Snyder v. *Massachusetts*, 291 U. S. 97, 78 L. Ed. 674;

West v. *Louisiana*, 194 U. S. 258, 48 L. Ed. 965;

Patterson v. *Colorado*, 205 U. S. 454, 51 L. Ed. 879.

IV

The Fourteenth Amendment to the Constitution of the United States is not concerned with the conduct of a criminal trial in a State Court if such trial were conducted with fundamental fairness, did not work a denial of fundamental rights or conflict with specific and applicable provisions of the Constitution of the United States, and was conducted according to the accepted course of legal proceedings. The burden of showing essential unfairness is upon him who asserts it.

Wolf v. *Colorado*, 338 U. S. 25, 93 L. Ed. 1782;

Buchalter v. *New York*, 319 U. S. 427, 87 L. Ed. 1492;

Lisenba v. *California*, 314 U. S. 219, 86 L. Ed. 166;

Jordan v. *Massachusetts*, 225 U. S. 167, 56 L. Ed. 1038.

ARGUMENT

I

An insurmountable obstacle to the granting of a writ of certiorari by this Court is that there was no contention before any court of the State of West Virginia that rights granted to the defendant by the Constitution of the United States had been violated. The printed record of this case filed in this Court does not disclose that the petitioner, at any time, in any manner, contended that any

action of any court through which this case has passed, deprived him of any of his rights under the Constitution of the United States.

It is settled law that in reviewing a judgment of a state court, this Court is bound by the record on which that judgment is based. *Hedgebeth* v. *North Carolina*, 334 U. S. 806, 92 L. Ed. 1739. And the determination of the state court that the practice and procedure by which such judgment was obtained conforms to the law of that particular state is conclusive on this Court. *Jordan* v. *Massachusetts*, 225 U. S. 167, 56 L. Ed. 1038; *West* v. *Louisiana*, 194 U. S. 258, 48 L. Ed. 965. This Court in the latter case said (page 261 of official report):

> "Whether the state court erred in its construction of the state Constitution and statutes and the common law on the subject of reading depositions of witnesses is not a Federal question. We are bound by the construction which the state court gives to its own Constitution and statutes and to the law which may obtain in the state, under circumstances such as those existing herein."

The failure of petitioner to claim at an appropriate time that his constitutional rights were violated by the actions of the state court precludes complaint to this Court that his rights under the Constitution of the United States have been invaded. In *Yakus* v. *United States*, 321 U. S. 414, 444, 445, 88 L. Ed. 834, 859, 860, the Court says:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil v. Vermont, 144 U. S. 323, 331, 12 S. Ct. 693, 36 L. Ed. 450; Barbour v. State of Georgia, 249 U. S. 454, 460, 39 S. Ct. 316, 317, 63 L. Ed. 704;

> Whitney v. People of State of California, 274 U. S. 357, 360, 362, 380, 47 S. Ct. 641, 71 L. Ed. 1095. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 53 S. Ct. 32, 77 L. Ed. 180, 86 A. L. R. 174. *While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts,* see Brandeis J. concurring in *Whitney* v. *California, supra* (274 U. S. at page 380, 47 S. Ct. 641, 71 L. Ed. 1107), and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases." (Italics supplied).

The mere fact a federal question may be hidden in the record does not permit this Court to consider this question for the first time. In *Whitney* v. *People of State of California,* 274 U. S. 357, 362, 71 L. Ed. 1095, 1100, says:

> "It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a Federal nature. *Dewey* v. *Des Moines,* 173 U. S. 199, 43 L. Ed. 666, 19 Sup. Ct. Rep. 379; *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 634, 44 L. Ed. 302, 20 Sup. Ct. Rep. 205. And this necessarily excludes from our consideration a question sought to be raised for the first time by the assignments of error here, —not presented in or passed upon by the Court of Appeal, — whether, apart from the constitutionality of the Syndicalism Act, the judgment of the Superior Court, by reason of the rulings of that court on questions of pleading, evidence and the like, operated as a denial to the defendant of due process of law."

Petitioner relies upon the order of the Supreme Court of Appeals of West Virginia entered on August 8, 1950,

refusing a writ of error and supersedeas and staying execution of sentence (R. 183) as indicating that the State court passed upon the federal question of whether petitioner had been denied due process of law. The order, however, does not so state. To the contrary, a writ of error and supersedeas to the judgment of the Circuit Court was refused at the request of petitioner (R. 181), upon the fifth application for the reason that the judgments of the Intermediate Court and the Circuit Court were plainly right. A further motion for a ninety day stay of execution was granted by a majority of the court by the same order, as authorized by West Virginia Code, 58-5-31. This statute is set out as Appendix A hereof. The fact that two judges would have refused the motion for a stay, for the reason that they were of opinion that no federal question arises in the case, does not indicate that the majority, in granting a stay as authorized by West Virginia Code, 58-5-31, considered the particular federal question of due process of law, especially since it had not been presented to the court either by petition or brief by petitioner, and the order of the court (R. 183) discloses the majority of the court specifically granted the stay pursuant to a state statute, Code 58-5-31, permitting a stay of execution for ninety days at the instance of any party to a controversy in the Supreme Court of Appeals who desired to present a petition to the Supreme Court of United States for an appeal from, or writ of error or supersedeas to, a final decree, judgment or order of the Supreme Court of Appeals. There is nothing in the statute cited requiring a finding by the Supreme Court of Appeals that a federal question, substantial or otherwise, exists in a case before a stay of execution could be granted thereunder. It is significant that the three judges who granted the stay refrained from stating that they believed a federal question did arise in the case. It seems logical to assume that such a statement would have been made particular-

ly by the two judges who would have granted a writ of error and supersedeas, if they had been of the opinion that such question did arise on the record. We respectfully submit that this Court is bound by the record and brief submitted to the Supreme Court of Appeals of West Virginia on the five futile applications for a writ of error and supersedeas, and that nothing in the order entered on the fifth application authorizes an inference that the Supreme Court of Appeals was acting on a basis that had never been presented to it. As this Court well knows, there are many petitions presented to it that involve no semblance of a federal question.

II

We respectfully submit that there is no federal question presented or involved in an interpretation by the state courts as to what constitutes, in a particular case, a proper dying declaration which may be used as evidence in a state criminal trial.

The petitioner is wrong in assuming that the Sixth Amendment of the Constitution of the United States governs procedure in the trial of criminal cases in state courts. The cases cited by petitioner, namely, *Shepard* v. *United States, supra, Carver* v. *United States, supra,* and *Mattox* v. *United States, supra,* are not in point. These decisions all refer to admission in evidence in a federal court criminal trial of certain dying declarations. It is well settled that the so-called Bill of Rights, as expressed in the first eight amendments to the Constitution of the United States does not govern procedure in the trial of criminal cases in state courts. *Betts* v. *Brady,* 316 U. S. 455, 86 L. Ed. 1595; *West* v. *Louisiana,* 194 U. S. 258, 48 L. Ed. 965. In the case of *Adamson* v. *California,* 332 U. S. 46, 51, 91 L. Ed. 1903, 1908, this Court held that the Bill of Rights, when adopted, was for the protection of the individual against the federal govern-

ment and its provisions were inapplicable to similar actions done by the states. In the case of *Wolf* v. *Colorado*, 338 U. S. 25, 26, 93 L. Ed. 1782, 1785, this Court stated that the notion that the due process of law is short hand for the first eight amendments of the Constitution of the United States has been rejected by this Court time and again and the issue is closed.

III

The Fourteenth Amendment to the Constitution of the United States does not guarantee a trial of state crimes in state courts free from error even material error. It was held in the case of *Snyder* v. *Massachusetts*, 291 U. S. 97, 105, 78 L. Ed. 674, 677, that the procedure of a state does not violate the Fourteenth Amendment because another method may seem fairer or wiser or give a surer promise of protection to a prisoner. An excellent statement of respondent's position is found in *Buchalter* v. *New York*, 319 U. S. 427, 429, 87 L. Ed. 1492, 1495, holding that the Fourteenth Amendment does not draw to itself the provisions of state constitutions or state laws. It leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrine as they deem appropriate; and does not permit a party to bring to the test of a decision in this Court every ruling made in the case of a trial in a state court. It was held in *West* v. *Louisiana*, 194 U. S. 258, 48 L. Ed. 965, that errors of the state court in construing a state constitution, statutes, and the common law on the subject of reading depositions of witnesses does not present any federal question which can be reviewed by the Supreme Court of the United States. In the case of *Bute* v. *Illinois*, 333 U. S. 640, 92 L. Ed. 986, this Court at pages 656, 657 of the official report states:

> "* * * There is nothing in the Fourteenth Amendment specifically stating that the long

> recognized and then existing power of the states over the procedure of their own courts in criminal cases was to be prohibited or even limited. * * *"

The court, at page 659, further states:

> "It is natural for state procedures to differ from each other in many ways. It is permissible for the states to establish ways of safeguarding the respective interests of the prosecution and of the accused in their courts. * * *"

It is stated on page 668 of the same opinion:

> "If, in the face of these widely varying state procedures, this Court were to select the rule contended for by the petitioner and hold invalid all procedure not reaching that standard, it not only would disregard the basic and historic power of the states to prescribe their own local court procedures (subject only to a broad constitutional prohibition in the Fourteenth Amendment against the abuse of that power) but it would introduce extraordinary confusion and uncertainty into local criminal procedure where clarity and certainty are the primary essentials of law and order."

In the case of *Patterson* v. *Colorado*, 205 U. S. 454, 51 L. Ed. 879, it was held that a decision of a state court upon a question of law cannot be reviewed by this Court as presenting a question of the violation of the Fourteenth Amendment because such decision is asserted to be wrong, and contrary to the previous decisions of the same court.

Petitioner also complains of certain instructions given and refused by the trial court in this case in the trial of the case below. Respondent again contends that giving or refusing to give instructions is a matter of state procedure and does not involve a federal question. *Buchalter* v. *New York*, 319 U. S. 427, 87 L. Ed. 1492. The

trial court acted properly, pursuant to state procedure, in refusing these specific defense instructions. See *State* v. *Stephenson*, 114 W. Va. 458, 172 S. E. 533, Syl. 1.

IV

This Court has said:

> "The Fourteenth Amendment, however, does not say that no state shall deprive any person of liberty without following the *federal* process of law as prescribed for the federal courts in comparable federal cases." *Bute* v. *Illinois*, 333 U. S. 640, 649, 92 L. Ed. 986, 991.

The Fourteenth Amendment does not prevent a state from determining its own rules of relevance of evidence to be used in the trial of a homicide case. *Lisenba* v. *California*, 314 U. S. 219, 86 L. Ed. 166. In the *Lisenba* case this Court held that the Fourteenth Amendment does not forbid a state court to construe and apply its own laws declaring the uncorroborated testimony of an accomplice to be insufficient to sustain a conviction by holding such testimony to have been sufficiently corroborated. This Court said in the same case (page 236 of the official report),

> "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. * * *"

In the case of *Wolf* v. *Colorado*, *supra*, this Court considered a prosecution in a state court for a state crime and held that the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.

The *Shepard*, *Carver* and *Mattox* cases, *supra*, relied on by petitioner, do not establish that there is any constitutional provision involved in the use of dying dec-

larations, and the decision in all of these cases involved a trial in a United States district court under federal rules of evidence.

In the instant case the victim knew she was going to die, held no hope of recovery, made statements identifying her assailant, stated that her assailant had robbed her, and died approximately forty-eight hours after the first of such statements. Certainly, it cannot be said that the courts of West Virginia have violated the Fourteenth Amendment by holding that the circumstances under which such declarations were made had such sanctions of verity as to give them evidentiary value which a jury could accept or reject gave reasonable assurance that they were true. We find neither logic nor authority in the petition or brief in support thereof which would show such conduct of the West Virginia State courts to be arbitrary and without foundation in reason.

CONCLUSION

We respectfully pray that petitioner be denied a writ of certiorari in this case.

ESTON B. STEPHENSON
Assistant Attorney General
of West Virginia
HERBERT W. BRYAN
Assistant Prosecuting Attorney
of Kanawha County, West Virginia
Charleston, West Virginia
Attorneys for Respondent

Of Counsel:
WILLIAM C. MARLAND
Attorney General of West Virginia
Charleston, West Virginia

APPENDIX "A"

CODE OF WEST VIRGINIA

Section 31, Article 5, Chapter 58 of the Code, as amended, reads:

> "At the instance of any party to a controversy in the supreme court of appeals who desires to present a petition to the supreme court of the United States for an appeal from, or writ of error or supersedeas to, a final decree, judgment or order therein, the supreme court of appeals during the term at which it is rendered or made, or any judge thereof within sixty days after the end of the term at which such decree, judgment or order is rendered or made, may make an order (which, if made in vacation, shall be certified by the judge to the clerk of said last mentioned court, and be entered by him in the proper order book) suspending the execution of such decree, judgment or order for ninety days after the end of the term at which it is rendered or made, when such person shall give bond before the clerk of said last mentioned court, or the clerk of the circuit court, from which the case or cause was taken to the supreme court of appeals, in such penalty as the court or judge may require, with a condition reciting such decree, judgment or order, and the intention of such person to present such petition, and providing for the payment of all such damages as any person may sustain by reason of such suspension, in case a supersedeas to such decree, judgment or order should not be allowed and be effectual within the time so specified."

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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

NO. 391

ROBERT BALLARD BAILEY,
Petitioner and Appellant Below,

v.

THE STATE OF WEST VIRGINIA,
Respondent and Appellee Below.

PETITION FOR REHEARING FOR WRIT OF CERTIORARI.

Robert Ballard Bailey, the petitioner, desires to refile his original petition for writ of certiorari.

I.

Jurisdiction, Constitutional Provisions Involved, Statement of the Case, and Statement of Proceedings have been related in the original petition on pages 2 and 3.

II.

ASSIGNMENT OF ERRORS

Assignment of Errors has been related in the original petition under Title III(a), on page 2.

III.

Statement of the case has been related under Statement of the Case III(c), page 4, of the original petition; however, we desire to state the following facts:

(1) Mrs. Fazio's statement as to the cause of her condition: Ruth Prenty (R. 49) said in answer to this question: "After you got Mrs. Shafer and she got there did she talk to Mrs. Fazio?" Answer: "She asked her what was wrong and she said a boy tried to kill her." Joe Fazio (R. 79) evidence shows that "Bob, the glass cutter" had caused her injuries; Frank Fazio (R. 97), that his mother told him that "Bob, the glass cutter" had caused her injuries; and Mrs. Frank Fazio (R. 99) evidence corroborates the evidence of Joe and Frank Fazio.

APPENDIX "A", — Affidavit of Emmett Thompson, a policeman of Charleston, West Virginia, for eighteen years, states that immediately after Mrs. Fazio was found he asked Dominic Fazio, husband of Mrs. Fazio, to ask Mrs. Fazio in Italian who had injured her. Mr. Fazio complied with the request and Mrs. Fazio made answer in Italian to Mr. Fazio and Mr. Fazio told the policeman she had said that "Bob, the fellow that fixes the glass, the big fellow" was the man who had injured her.

(2) The evidence of Ralph W. Ballard (R. 101) is that he saw Mrs. Fazio at approximately five o'clock the same afternoon in what he thought to be a black Buick sedan automobile.

APPENDIX "B", — This exhibit from the State Road Commission of the State of West Virginia shows that in 1946, at the time he made application for a license that Robert Ballard Bailey weighed 155 pounds.

APPENDIX "C", — Affidavit of Pearl Bailey, mother of Robert Ballard Bailey, asserts that for the past several

years, prior to his confinement in 1949 in jail and the penitentiary, Robert Ballard Bailey's weight was around 150 pounds and that his weight stayed practically the same.

State Exhibit No. 7 (R. 160C) The photograph of Robert Ballard Bailey.

V.

REASONS FOR ALLOWANCE OF WRIT

The reasons for allowance of writ have already been related in the original petition under TITLE IV, page 9; however, we desire to add her Point 9.

9. The affidavits, Appendix "B" and Appendix "C" and Appendix "D" of the original petition and brief, and Appendix "A", Appendix "B", and Appendix "C" of this petition are newly discovered evidence which corroborates the evidence of Robert Ballard Bailey as to his innocence, and such evidence has not been considered heretofore by any court, except this court as to a part of the affidavits filed in the original brief.

In view of this newly discovered evidence Robert Ballard Bailey is entitled to a new trial and the opportunity of presenting all the facts. Under our Constitution he is entitled to a fair and impartial trial.

PRAYER

Petitioner, therefore, prays that this petition be granted and for such other and further relief in the premises that may be proper and just.

This the 18th day of December, 1950.

ROBERT BALLARD BAILEY,
By W. HAYES PETTRY,
Attorney for and of
Counsel with Petitioner.

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

I, W. Hayes Pettry, do hereby certify that the foregoing petition for rehearing for writ of certiorari is not made for the purpose of delay and is made in good faith.

W. HAYES PETTRY.

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

NO. 391

ROBERT BALLARD BAILEY,
Petitioner and Appellant Below,

v.

THE STATE OF WEST VIRGINIA,
Respondent and Appellee Below.

BRIEF IN SUPPORT OF PETITION FOR REHEARING FOR WRIT OF CERTIORARI.

Robert Ballard Bailey, the petitioner, desires to refile his original brief, together with this brief in support thereof.

I.

OPINION OF THE COURT

The opinion of the court below will be found on page 13 of the original brief filed herein.

II.

JURISDICTION

The jurisdiction of this Court will be found on page 13 of the original brief filed herein.

III.

The facts in the case have already been related in the original petition under Title III(c), page 4, and in the foregoing petition under Title III (c).

2 Assignment of Errors have already been related in the original petition under Title III (a).

IV.

GROUNDS FOR JURISDICTION

The grounds on which the jurisdiction of this Court is invoked have already been related in the original petition and in the preceding petition under Title IV—Reasons for Allowance of Writ.

ARGUMENT

The statements of Mrs. Rosina Fazio as to the cause of her injuries are irreconcilable.

(1) Ruth Prenty (R. 49) states that Mrs. Fazio told Mrs. Shafer that "a boy tried to kill" her.

(2) The affidavit of Emmett Thompson, the policeman, who saw Mrs. Fazio soon after she was found on the night of October 22, 1949, at the hospital in the emergency room at the St. Francis Hospital, that Dominic Fazio, the husband of Rosina Fazio, asked her in Italian who had injured her and she said "Bob, the fellow that fixes glass, the big fellow."

(3) Then the evidence of Joe Fazio (R. 79), her son, Frank Fazio (R. 97), another son, and Mrs. Frank Fazio (R. 99) that it was "Bob, the glass cutter" who had injured her, and also identified the picture of Robert Ballard Bailey.

Let us analyze the three statements made by Mrs. Fazio with reference to her injury and the cause of her death:

First, Ruth Prenty's evidence (R. 49) that Mrs. Fazio stated a boy tried to kill her. Robert Ballard Bailey was born December 11, 1913 (R. 124)). At the time of the incident in this case Robert Ballard Bailey was thirty-five years old. Then it must follow that he could not be considered a boy, because of his age.

Second, The statement of the Policeman, Emmett Thompson, that it was "Bob, the man who fixes glass. The big fellow." This statement shows clearly that it was not Robert Ballard Bailey for the reason that his picture and affidavits shows Robert Ballard Bailey to be a man of 150 to 155 pounds. Certainly, a man of this weight could not be considered as a "big fellow." Also in view of his height which is five foot 9 inches.

It is strange that the policeman, Emmett Thompson, who saw Mrs. Fazio the night of her injury was not brought forth at the trial.

Third, The statements made by Mrs. Fazio to her two sons and daughter-in-law are the only statements that would implicate Robert Ballard Bailey. It is to be noted that the only statements made which would indicate that Robert Ballard Bailey had injured Mrs. Fazio were made to her two sons and her daughter-in-law, while the other two statements were made to and in the presence of other people.

Now then, let us examine which one of these three statements, under the evidence, is the most accurate. We contend that Statement No. 2, which Mrs. Fazio made to the policeman, Emmett Thompson, at the St. Francis Hospital, that it was "Bob, the big fellow" is the most accurate, for the reason that the affidavits of Goldie Moore and George Rowlands, Appendix B and Appendix C of the original petition assert that they saw Mrs. Fazio about five o'clock on the afternoon she was injured and

that she was with a man who was not Robert Ballard Bailey, and who was a big man. We urge that the statement made to the policeman, Emmett Thompson, is the most logical in view of the affidavits of Moore and Rowlands that can be attached to any of her statements.

Due to the inconsistencies of the three different statements made by Mrs. Fazio on the three different occasions as to who caused her injuries, none of them should be admitted in evidence as a dying declaration.

The Constitution of the United States guarantees to Robert Ballard Bailey a fair and impartial trial. We believe that the newly discovered evidence which is contained in the various affidavits submitted herewith is material and relevant evidence which was not presented to the jury at the trial, and unless Robert Ballard Bailey is given the opportunity to present all the evidence relevant and material to his case, then we believe that he has not been given a fair and impartial trial as guaranteed by the Constitution of the United States.

Under our system of jurisprudence the accused should be given the benefit of all reasonable doubt, and this newly discovered evidence, which evidence was not available to Robert Ballard Bailey at the time of his trial, would create a doubt as to his guilt. It is to be noted that much of this evidence was known to the State at the time of the trial, and in our humble belief, if it had been presented to the jury, the jury would have reached a different conclusion.

We urge that this case be reopened, and that the petitioner be given an opportunity to present all pertinent and newly discovered evidence for consideration by the court and jury as to his innocence or guilt upon a new trial, so that his Constitutional rights guaranteeing a fair and impartial trial will not be infringed upon or denied.

CONCLUSION

Your petitioner respectfully submits that the questions presented by the original petition and the foregoing petition show facts calling for the exercise by this Court of its supervisory powers, — that the petitioner's rights under the Constitution of the United States be preserved, and that upon this rehearing a writ of certiorari should be granted, and the questions herein should be reviewed by this Court.

Respectfully submitted,

W. HAYES PETTRY,
Attorney for and of
Counsel with Petitioner.

APPENDIX "A"

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

This day came Emmett Thompson before the undersigned authority, who, after being first duly sworn deposes and says that he is a citizen of Charleston, Kanawha County, West Virginia, and is a member of the Police Department and has been such for about eighteen (18) years; that he was a member of the Charleston Police Department on the 22nd day of October, 1949, and that at between 11:30 and 12:00 o'clock P. M. of that day, a call came in to police headquarters about the injury of a woman who was then in the St. Francis Hospital; that this affiant, along with Jack Lacy, answered said call and went to the St. Francis Hospital at about midnight of that Saturday night and they found that Mrs. Rosina Fazio was the person injured and she was then in the emergency room of the said St. Francis Hospital, and that this affiant had personally known Mrs. Rosina Fazio for the past twenty (20) or twenty-five (25) years and she knew him personally; that this affiant asked her husband, Dominec Fazio, to ask her in Italian who had injured her and that Mr. Fazio complied with this request and that Mrs. Fazio made answer in Italian to Mr. Fazio and he, Mr. Fazio, told this affiant that she said "Bob, the fellow that fixes the glass, the big fellow" was the man who had injured her. This was all the information this affiant got at that time about who had injured her.

Further deponent saith not.

S/ EMMETT THOMPSON

Taken, subscribed and sworn to before me this 13th day of December, 1950. My commission expires June 8, 1952.

S/ D. B. DAWSON
Notary Public.

APPENDIX "B"

7387

OPERATOR'S LICENSE APPLICATION

(THIS APPLICATION NOT TO BE USED BY CHAUFFEURS)

1. MAR 14 1946 EXPIRES APR 1 1950 — 408973

7. FULL NAME (PRINT) Robert Ballard Bailey

3. STREET ADDRESS OR R F D NO 219 Aletha Street

4. CITY OR POST OFFICE Charleston STATE West Va

USE BLACK INK

5. SIGNATURE OF LICENSEE Robert Ballard Bailey

SEX	COLOR	WEIGHT	HEIGHT	COLOR OF EYES
6. M	W	155	5 FT. 9 IN	Brown
COLOR OF HAIR	MONTH BORN	YEAR BORN	PREVIOUS OPERATOR NO	
7. Brown	Dec.	1913	427589	

ALWAYS CARRY THIS OPERATOR'S LICENSE WHEN DRIVING

ALL QUESTIONS MUST BE ANSWERED

Answer All Questions Here

MAR 8 1946 — 3 2017

8. Is your vision impaired in any way? — No

8A. If so, is your vision corrected to normal by the use of glasses? — No

9. Have you any mental or physical disability? — No

10. Are you addicted to the use of intoxicating liquors, drugs, or narcotics? — No

11. Have you been convicted in this State or any other state or country of an offense that acts to prohibit you from being licensed in this State as an operator? — No

12. Are you licensed as an operator or chauffeur in any state other than West Virginia? — No

If so, what state _____ License No. _____

13. Has your privilege to operate motor vehicles ever been revoked, suspended, or refused in this or in any other state? — Yes

14. Has your name or address been changed in any way since you were last issued a West Virginia operator's or chauffeur's license? — Yes

DISCHARGED VETERAN SEE OTHER SIDE

FEE FOR OPERATOR'S LICENSE IS 75 CENTS
IF ANSWER IS YES TO QUESTIONS Nos. 8, 10, 11, 13, OR 14 EXPLAIN IN SPACE PROVIDED ON REVERSE SIDE.

Applicant's Signature Robert Ballard Bailey

STATE OF WEST VIRGINIA,
COUNTY OF Marshall, to-wit:

Taken, Sworn, and subscribed to before me this 6 day of Mar 1946.

My commission expires FEB 1, 1950

[illegible]

If officer administering oath is a Member of the Department of Public Safety give badge number A1 [illegible]

ENDORSEMENT ON BACK OF APPENDIX "B"

December 18, 1950

STATE OF WEST VIRGINIA
DEPARTMENT OF MOTOR VEHICLES

I, RALPH L. BALLARD, Deputy Commissioner, of the Department of Motor Vehicles of West Virginia, and as such am duly authorized to certify all records of the Department, do hereby certify that the attached is a true and correct copy of application for West Virginia Operator's license No. 408973, issued in the name of Robert Ballard Baily, 210 Aletha Street, Charleston, West Virginia.

Given under my hand and the Seal of the Department of Motor Vehicles of West Virginia, this 18th day of December, 1950.

[SEAL]

S/ RALPH L. BALLARD
Deputy Comm. Dept. of Motor Vehicles of W. Va.

APPENDIX "C"

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

This day personally appeared before the undersigned Pearl Bailey, who after being duly qualified according to law, deposes and says that she is the mother of Robert Ballard Bailey who was born December 11, 1913; that on October 22, 1949, her son Robert Ballard Bailey weighed approximately one hundred fifty (150) pounds, and that his weight for several years preceding October 22, 1949, had not varied more than a few pounds, and deponent further says that her son, Robert Ballard Bailey, has been considered as a small man.

S/ PEARL BAILEY

Taken, subscribed and sworn to before me this the 18th day of December, 1950.

My commission expires the 14th day of February, 1955.

S/ D. CLOY HUSTON
Notary Public.

[SEAL]